Supreme Court, U.S.
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No. 91-2050

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RAY G. BESING AND RAY G. BESING & ASSOCIATES, P.C., *Petitioners*

v.

SEELIGSON, DOUGLASS, FALCONER & VANDEN EYKEL, P.C.; M. J. "IKE" VANDEN EYKEL; THOMAS T. ROGERS; LYNCH, CHAPPELL, ALLDAY AND ALSUP; AND SMALL, CRAIG & WERKENTHIN, *Respondents*

Brief in Opposition on Behalf of Respondent Lynch, Chappell, Allday and Alsup

COWLES & THOMPSON
CHARLES T. FRAZIER, JR.
Counsel of Record
Texas State Bar No. 07403100
4000 NationsBank Plaza
901 Main Street
Dallas, Texas 75202
(214) 670-1100
(214) 698-0310 (Fax)
Attorneys for Respondent Lynch, Chappell, Allday and Alsup

Fort Worth Brief Printing Co., 610 South Jennings Avenue, Fort Worth, Texas 76104 Phone 817-332-4070

QUESTIONS PRESENTED

1. Whether a prior state court judgment holding that Petitioners did not have standing to invoke 11 U.S.C. §108(a) to extend limitations for filing a legal malpractice claim collaterally estopped Petitioners from re-litigating this very same issue before the U.S. Bankruptcy Court.

2. Whether the tolling provision of 11 U.S.C. §108(a) was available to Petitioners when they filed their lawsuit in state court after confirmation of their bankruptcy reorganization plan.

LIST OF PARTIES

1. Ray Besing
2. Ray G. Besing & Associates, P.C.
3. Counsel: Jamie Wall
   Dallas, Texas
4. Lynch, Chappell, Allday & Alsup
5. Counsel: Cowles & Thompson
   Dallas, Texas
6. Small, Craig & Werkenthin
7. Thomas T. Rogers
8. Counsel: Thompson & Knight
   Dallas, Texas
9. Seeligson, Douglass, Falconer & Vanden Eykel
10. M. J. "Ike" Vanden Eykel
11. Counsel: Brill, Sinex & Stephenson
    Dallas, Texas

None of the above-mentioned corporations have parent companies or subsidiaries.

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Brief in Opposition on Behalf of Respondent Lynch, Chappell, Allday and Alsup

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Lynch, Chappell, Allday & Alsup respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's unreported opinion which appears in Section A of the Appendix to the Petition for Writ of Certiorari.

A. STATEMENT OF THE CASE

This case was presented to the Fifth Circuit on the basis that the district court erred in affirming the bankruptcy court's summary judgment in favor of Respondents on collat-

eral estoppel grounds. Each Respondent's motion for summary judgment before the bankruptcy court urged that a prior state court judgment holding that Petitioners' legal malpractice claim against Respondents was barred by limitations collaterally estopped them from seeking the same relief again.

1. Court Proceedings and Disposition In Courts Below:

Lynch generally agrees with Petitioners' description of the course of proceedings below, except that this appeal does not involve the correct construction of section 108(a) of the Bankruptcy Code.

Ray G. Besing and Ray G. Besing & Associates, P.C. (the "Besings") brought a declaratory judgment action on September 19, 1989, in the United States Bankruptcy Court for the Northern District of Texas ("the bankruptcy court") seeking a determination that they were debtors-in-possession and thus entitled to rely on the tolling provisions of the Bankruptcy Code. (R. 239-242.) The bankruptcy court denied the Besings' Motion for Summary Judgment and granted all of the Respondents' Motions for Summary Judgment, holding that the Besings were collaterally estopped from raising this issue because a Texas district court had previously ruled on the very same issue in a suit involving identical parties. (R. 575-576; 284; 361; 375; 388; 467; 473; 533.) The federal district court and the Fifth Circuit affirmed the summary judgment on the same collateral estoppel grounds. (R. 211-214; Petitioners' Appendix A.)

2. Statement of Facts:

Lynch vehemently denies the Petitioners' statements as fact that Lynch's legal representation was in any way negligent, caused the Besings' pleadings to be struck and/or caused the rendition of a default judgment and summary judgment with regard to Noble's counterclaims. (Petition at 3.)

The Besings filed their petitions in bankruptcy on March 25, 1988. (R. 241.) The Besings' Joint Plan of Reorganization was confirmed on June 28, 1989. (*Id.*). The Confirmed Joint Plan of Reorganization expressly revested all property of the bankruptcy estate in the Besings as Debtors, other than Besing's homestead, an Austin condominium, an automobile and some IBM equipment. (*See* Appellants' Record Excerpt No. 7 at 12 – Confirmed Joint Plan of Reorganization, filed in the Bankruptcy Cases Nos. 388-031749 and 388-31750, styled "In Re: Ray G. Besing & Associates, P.C." and "In Re: Ray G. Besing.")

The Besings brought a lawsuit in the 68th Judicial District Court of Dallas County, Texas ("the state action") on September 19, 1989, alleging professional negligence and malpractice on the part of the Respondents, all attorneys or law firms who previously represented the Besings during the course of litigation with Mr. Besing's former fiancee. (R. 295-307.) Each Respondent filed motions for summary judgment on statute of limitations grounds. (R. 318-330; 420-425; 492-500; 533-542.) The state district court properly held that the Besings' cause of action was barred by the statute of limitations, as they were no longer debtors-in-possession and entitled to the tolling provision of the Bankruptcy Code. The court entered an interlocutory summary judgment for five of the Appellees, which later became final through severance. (R. 284-359; 354-355; 356-357; 358-359).

In the state action, the Besings admitted that the Respondents' statute of limitations defense "turns on whether 11 U.S.C. §108(a), which operates to extend the period of limitations, is available to Plaintiffs" as debtors-in-possession on September 19, 1989. (R. 338.) The state court thereafter denied the Besings' Motion for Rehearing and Motion for Abatement and affirmed the summary judgments. (R. 356-357.) The Besings then filed a Motion for New Trial with the

state district court. The state district court allowed the motion to be overruled by operation of law and the judgments became final.

The state court judgment in favor of Lynch is final, pending the Besings' Application for Writ of Error to the Texas Supreme Court.

B. REASONS FOR DENYING THE WRIT

1. No Important Issues Are At Stake:

The Fifth Circuit's opinion reflects that this case presents an elementary example of collateral estoppel. Notwithstanding the final judgment before a court of competent jurisdiction on Petitioners' standing to invoke the tolling provision of section 108(a), Petitioners nevertheless proceeded to seek adjudication on the exact issue in the U.S. Bankruptcy Court. The facts in this case are hardly unique, and the application of the collateral estoppel doctrine was so clear the Fifth Circuit decided its opinion has no precedential value.

2. The Decision Properly Applies The Collateral Estoppel Doctrine:

Petitioners presented and lost this same issue three times in the 68th District Court of Dallas County, Texas. The state court rejected the Besings' tolling argument and found limitations had run in its rulings on Respondents' Motions for Summary Judgment and on the Besings' Motion for Rehearing. (R. 533-542; 354-359.) Accordingly, the Fifth Circuit correctly held the bankruptcy court properly granted Lynch's Motion for Summary Judgment and denied the Besings' Motion for Summary Judgment. (R. 575-576.)

The elements of collateral estoppel are: (1) the same issue is involved in both actions, (2) the issue was actually litigated in the first action after a full and fair opportunity for litigation,

(3) the issue was actually and finally decided, (4) it was necessary to decide the issue in disposing of the first action, (5) the later litigation is between the same parties or involves non-parties that are subject to the binding effect or benefit of the first action, (6) the role of the issue in the second action was foreseeable in the first action, and (7) there are no special considerations of fairness, relative judicial authority, or changes of the law that warrant remission of the ordinary rules of preclusion. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §4416 at 137-138 (1981). Petitioners do not contest the fulfillment of these requirements; rather, they argue that two exceptions apply.

a. De Novo Exception Does Not Apply:

In *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1 (Tex. 1986), the Texas Supreme Court held that a final judgment of a collateral court, even if an appeal is pending, is final for collateral estoppel purposes in another action except in the unusual circumstance where the appeal is essentially a trial de novo. *Id.* at 6. *See Prager v. El Paso National Bank*, 417 F.2d 1111, 1112 (5th Cir. 1969). The Besings alleged in the Fifth Circuit for the first time that the appeal of the state action is actually a trial de novo. They argued that the state appellate court must "itself interpret and construe section 108(a) anew, unrestricted by any presumption or deference favoring the trial court." While noting it ordinarily does not consider issues not raised in the courts below, the Fifth Circuit properly concluded that such argument is entirely without merit.

The Besings ignore the fact that, except in the limited circumstances provided by statute, the jurisdiction of Texas intermediate courts of appeals is exclusively appellate. Tex. Const. Art. 5, §6; Tex. Gov't. Code Ann. §22.220 (Vernon 1988); *Leslie v. Houston Natural Gas Corp.*, 280 S.W.2d 353,

360 (Tex. Civ. App. – Galveston 1955, writ ref'd n.r.e.) *cert. denied*, 352 U.S. 829 (1956). Intermediate appellate courts in Texas only have original jurisdiction to issue writs necessary to enforce their jurisdiction, and writs regarding mandamus, prohibition and habeas corpus. Tex. Gov't. Code Ann. §22.221 (Vernon 1988); *Welder v. Fritz*, 750 S.W.2d 930, 932 (Tex. App. – Corpus Christi 1988, orig. proceeding).

When reviewing a summary judgment, the appellate court must determine whether the evidence before the trial court was sufficient to support a party's claim and/or defense as a matter of law. Tex. R. Civ. P. 166a(c); *Johnny C. Ivy Plumbing Co. v. Keyser*, 601 S.W.2d 158, 160 (Tex. Civ. App. – Waco 1980, no writ); *Richmond Trust v. Kutner*, 504 S.W.2d 539, 541 (Tex. Civ. App. – Dallas 1973, writ ref'd n.r.e.) Accordingly, the appellate court's review of the district court's summary judgment in this case was not a trial de novo – an exercise of original jurisdiction – but an appellate review of the trial court's judgment in lieu of the record before it.

Texas courts have defined a trial de novo as follows:

> A de novo trial means "anew; afresh; in the same manner; with the same effect; a second time." 18 C.J., 486; 25 C.J.S., De novo, p. 1011. Power to try a case de novo vests a court with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court. *Zurich General, etc., Co. v. Rodgers*, 128 Tex. 313, 97 S.W.2d 674, 675. From the above authorities we conclude that a de novo judicial trial means a full civil trial on the facts as well as the law.

Lone Star Gas Co. v. State, 137 Tex. 279, 153 S.W.2d 681, 692 (1941). Because the Dallas Court of Appeals did not exercise original jurisdiction over the Besings' negligence and malprac-

tice causes of action, the Besings' argument that the trial de novo exception to the collateral estoppel rule is without merit.

Moreover, the Besings' continued analogy to *Citibank, N.A. v. Graphic Scanning Corp.*, 618 F.2d 222 (2nd Cir. 1980) is misplaced. In *Citibank*, a New York state court awarded Graphic Scanning partial summary judgment regarding collection of unpaid fees from Citibank. *Id.* at 225. In that action, Citibank pleaded the affirmative defense of illegality, alleging that Graphic Scanning was in violation of the Federal Communications Act. *Id.* The state court disposed of that matter by summary judgment "without taking any proof of facts" and expressing only "a conclusion of law." *Id.*

The Second Circuit Court of Appeals held that the state court action was not binding upon the Federal Communications Commission ("FCC") in determining whether Graphic Scanning was a common carrier as defined by the FCC. *Id.* The court, applying New York law, simply held that a state court in a later case "would not consider itself precluded from trying the underlying facts which affect the legal conclusion previously determined" on the summary judgment motion. *Id.* (Citations omitted.) The Besings failed to note in their Brief that the court in *Citibank* expressly held that the issues in the state action and in the federal action were *not* identical. *Id.* Accordingly, the court properly held that the prior decision did not necessarily render for all time that Graphic Scanning was not a common carrier and therefore not obligated to follow the tenets of the Federal Communications Act. *Id.* at 225-226. Nowhere in the *Citibank* opinion does the court hold that the judgment of the state action was not final with regard to any of the issues presented before it.

b. The State Court Was Competent to Decide Section 108(a)'s Effect on the Malpractice Claims:

Likewise, the Besings' claim that the exception to the collateral estoppel rule relating to the allocation of jurisdiction is groundless. They base this argument upon section 28(3) of the Restatement (Second) of Judgments. This section provides, in part:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> . . .
>
> (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them. . . .

Restatement (Second) of Judgments §28(3)(1982).

Comment (e) to section 28 reveals that the latter half of exclusion (3) concerns a state court's determination of a matter that is within exclusive jurisdiction of the federal court. The Besings argue that because bankruptcy law is not the "bailiwick" of the state court, the application of section 108(a)'s tolling provision should be left to the federal court. The Besings concede that the state court does have jurisdiction to interpret the application and effect of section 108 upon their state action. Accordingly, their argument is inherently inconsistent. If state courts are not able to apply various aspects of federal law in a lawsuit that does not expressly fall within the exclusive jurisdiction of the federal courts, then any party not satisfied with a state court's ruling would be permitted to immediately file the same claim anew in federal court. This, of course, would emasculate the doctrine of collateral estoppel

and would result in needless, repetitive litigation. *See* 28 U.S.C. §1738.

The federal district courts have original and exclusive jurisdiction "of all cases under title 11." 28 U.S.C. §1334(a). The district court's jurisdiction, however, is original but not exclusive "of all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. §1334(b). The civil proceeding at issue is a negligence and malpractice cause of action that the Besings chose to file in state court. Their suit does not arise under title 11 nor is it necessarily connected thereto. The only connection with federal law is Lynch's affirmative defense of limitations, which necessarily involves the interpretation of the bankruptcy tolling provision. This determination does not involve the exclusive and/or original jurisdiction of the federal district courts. The only cases acknowledging Congress' intent to vest bankruptcy courts with exclusive jurisdiction because of their special competence involve proceedings on the discharge of debts. *See In re Rudd*, 104 B.R. 8 (Bkrtcy. N.D. Ind. 1987); *In re Houtman*, 568 F.2d 651, 3 B.C.D. 1403 (9th Cir. 1978). The Fifth Circuit has noted that "the only aspect of the bankruptcy proceeding of which the districts and their bankruptcy units have exclusive jurisdiction is 'the bankruptcy petition itself.'" *Matter of Brady, Texas, Municipal Gas Corp.*, 936 F.2d 212, 218 (5th Cir.), *cert. denied sub nom. Sanders v. City of Brady, Tex.*, ___ U.S. ___ 112 S.Ct. 657 (1991). Accordingly, the Fifth Circuit properly held that the state court's ruling on the application of section 108(a) is not a matter within the exclusive jurisdiction of the bankruptcy court and, therefore, does not fall within the allocation of jurisdiction exception to collateral estoppel.

3. The Tolling Provision of Section 108 Was Not Available To The Besings At The Time They Filed Their State Action:

Both the Fifth Circuit and the district court did not address the substantive issue of whether the Besings were entitled to the tolling provisions of section 108(a) when they filed their malpractice claim in state court. Nevertheless, both the Besings and Lynch raised this substantive issue before both courts. Thus, this substantive issue will have to be addressed if writ is granted in this case.

a. Because The Bankruptcy Estate Reverted To The Besings, They Were No Longer Debtors-In-Possession:

Pursuant to Chapter 11 of the Code, all property of a bankruptcy estate reverts in the debtor on *the date of confirmation*.

> Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

11 U.S.C. §1141(b). Bankruptcy courts have consistently held that confirmation of a plan of reorganization terminates debtor-in-possession status. *See, e.g., In re Grinstead*, 75 B.R. 2 (Bkrtcy. D. Minn. 1985); *U.S. v. Redmond*, 36 B.R. 932 (D. Kan. 1984). The tolling provisions of the Code have no application to a debtor post-confirmation, but are provided only to toll limitations in actions by a trustee (or debtor-in-possession) for the benefit of the estate. *In re Lawler*, 106 B.R. 943, 961 (N.D. Tex. 1989).

In *Grinstead*, the court held that the debtors lost their debtors-in-possession status on the date their Plan of Reorganization was confirmed.

> The term "debtor-in-possession" is intended to refer to a debtor who *during the pendency of a case prior to confirmation retains* property in the fiduciary capacity of a trustee of the estate. Once a plan of reorganization is confirmed, the bankruptcy estate ceases to exist unless the plan specifically provides otherwise, and all estate property revests in the debtor subject to the terms and conditions imposed by the plan. *There is no debtor-in-possession status of a debtor post-confirmation.*

Grinstead, 75 B.R. at 3 (citations omitted) (emphasis added).

In *Redmond*, the court rejected the position that the debtors continued to be debtors-in-possession because the estate was being administered and was not closed. In so doing, the Court held:

> Unless a reorganization plan provides otherwise, confirmation vests all of the property of the estate in the debtor and releases it from all claims and interest of creditors. . . . It is clear that upon confirmation of a plan of reorganization, property of the bankruptcy estate vests in the organized debtor, a new entity, and administration of the estate ceases.

Redmond, 36 B.R. at 934 (citations omitted).

Section 1141(b) and the cases interpreting it dispose of Petitioners' position that they were debtors-in-possession unless their plan of reorganization expressly vested the claim against Lynch in someone other than the debtor. In *Cunningham v. Healthco, Inc.*, 824 F.2d 1448 (5th Cir. 1987), the court addressed this issue, finding that the plan of reorganization explicitly "contained a reservation of rights by the creditors in the event that [the debtor] recovered, by way of lawsuit, any damages from [the defendant]." *Id.* at 1452. Because of this express reservation for the benefit of creditors, the court held

that the debtor was still a debtor-in-possession post confirmation. *Id.* at 1460.

In this case, however, section 4.1 of the Plan expressly vests the Debtors (the Besings) with *all* of the property in the Besing Estate on the Effective Date of the Plan except the liens described in paragraphs 3.4, 3.4.1, and 3.5.1 therein. (The Plan at 12-13 – Appellants' R. Exc. No. 7.) Those liens described in Paragraph 3.4, 3.4.1, and 3.5.1 did *not* reserve the cause of action against any of the Respondents in this case, but related to interests in Besing's homestead, his Austin condominium, an automobile and some IBM equipment. (*Id.* at 9-11.) The alleged cause of action against Lynch was not reserved for the Estate, but vested in the Besings. Indeed, the Plan negates any interpretation of continued debtor-in-possession status for the Besings. Article IV of the Plan provides that on its Effective Date (3 days after confirmation, or July 1, 1989) "each *Debtor* shall turnover all funds in the *debtor-in-possession* accounts to Besing P.C. and Besing." (*Id.* at 12.) (Emphasis added.) Accordingly, the Besings lost the status of debtor-in-possession. *In re Grinstead*, 75 B.R. at-3.

As did the state courts, the bankruptcy court also found that the Besings were a reorganized entity rather than a trustee/debtor-in-possession who is not entitled to the tolling provisions of the Code. At the oral argument on the parties' motions for summary judgment in the bankruptcy court, the court repeatedly stated that the Besings were "not before the Court as a debtor-in-possession." (Tr. 17: 13-19; 8:25-9: 1.) Furthermore, the bankruptcy court further recognized that section 1141(b) provides that "as soon as a plan is confirmed, a property leaves a debtor-in-possession and goes back to the debtor." (*Id.* at 10:23-25.)

b. The Tolling Provision Does Not Apply To Post-Confirmation Debtors:

In *In re Lawler*, 106 B.R. 943 (N.D. Tex. 1989), the court held that the tolling provisions of the Code have no application to a debtor post-confirmation, but are only provided to toll limitations in actions brought by the trustee (or debtor-in-possession) for the benefit of the estate. *Id.* at 961. The Besings argue that no distinction exists between a debtor and debtor-in-possession. However, Judge Fish's opinion in *In re Lawler* clearly demonstrates that because the limitations tolling provision applies *only* to the trustee/debtor-in-possession, there most definitely is a significant distinction after plan has been confirmed and a debtor-in-possession is returned to "debtor" status.

Indeed, where a trustee or debtor-in-possession does not bring the action, section 108, "does not help or hinder a debtor prosecuting a case on his own behalf; it simply does not apply." *Id.* Moreover, the Fifth Circuit has expressly held that "[w]hile a debtor-in-possession is entitled to section 108(a)'s tolling period, however, a debtor is not." *Cunningham*, 824 F.2d at 1460 (citing *In re Dixon*, 432 F.Supp. 752, 756 (W.D.N.C. 1977); *In re Dohm*, 14 B.R. 701, 702 (Bkrtcy. N.D. Ill. 1981); *In re Craig*, 75 B.R. 864, 866 (Bkrtcy. E.D. Tenn. 1980)). *See also Grinstead*, 75 B.R. at 3 (holding that there is "no debtor-in-possession status of a debtor post-confirmation.")

In *In re Dixon*, the confirmed reorganization plan vested a truth-in-lending cause of action in the trustee. 432 F.2d at 756. Thereafter, both the trustee and the debtor brought truth-in-lending suits after limitations would have normally run. *Id.* The Court expressly held that the tolling provisions of the Code applied to the trustee, but not to the debtor. Accordingly, the trustee's suit was not barred, but the debtor's was. *Id.*

In *In re Craig*, the debtors filed a truth-in-lending cause of action after filing bankruptcy and after the limitations for such a cause of action and would have otherwise expired. 7 B.R. at 865. Thereafter, the bankruptcy case was dismissed without the trustee ever pursuing the cause of action. *Id.* Because the trustee had abandoned the suit, the court held that the debtors could not continue with the suit because section 108(a)'s tolling effect no longer applied. *Id.* at 866.

In none of the cases relied upon by the Besings for the proposition that a debtor post confirmation may rely upon the tolling provisions of section 108(a) was the applicability of section 108(a) actually an issue. These pre-*Cunningham* cases primarily addressed the representation of an attorney for a debtor as opposed to a debtor-in-possession, or concerned the jurisdiction of the bankruptcy court to hear preference cases under sections 547, 548 and 549 of the Code and the debtor's standing to bring such action. In *In re Triangle Chemicals*, 697 F.2d 1280 (5th Cir. 1983), the court addressed the issue of whether a bankruptcy court could approve the employment of attorneys for a debtor-in-possession after the employment had already begun. In holding that the bankruptcy court had discretion to do so, this court held that "there is no distinction between the 'debtor' and the 'debtor-in-possession' . . . *with regard to acts or transactions performed on its behalf* subsequent to the filing of the reorganization petition." *Id.* at 1290. (Emphasis added.)

Likewise, *In re Hargis*, 73 B.R. 622 (Bkrtcy. N.D. Tex. 1987), and *In re Chapel Gate Apartments, Ltd.*, 64 B.R. 569 (Bkrtcy. N.D. Tex. 1986), involved the procedures for allowance of attorneys fees in Chapter 11 cases. The application of section 108(a) was not an issue. Interestingly, the court in *In re Chapel Gate* succinctly noted the distinction between a debtor and a debtor-in-possession:

> Under §1107, a debtor is either a debtor-in-possession, and therefore occupies a strictly fiduciary role, or it is not, in which case a trustee administers the estate for the benefit of the creditors. Where no trustee has been appointed in a case under Chapter 11, the terms "debtor" and "debtor-in-possession" though used interchangeably for convenience, are in substance mutually exclusive; an entity can be one or the other but cannot simultaneously occupy both roles.

64 B.R. at 576.

A significant number of the cases relied upon by Petitioners address standing and jurisdiction with regard to causes of action to set aside preferential or fraudulent transfers under sections 547, 548, and 549 of the Code. *See In re Corvettes, Inc.*, 42 B.R. 217 (Bkrtcy. S.D.N.Y. 1984); *In re J.E. Jennings, Inc.*, 46 B.R. 167 (Bkrtcy. Pa. 1985); *In re Chernicky Coal Co., Inc.*, 67 B.R. 828 (Bkrtcy. W.D. Pa. 1986). In *Jennings* and *Corvettes*, the court noted that the standing of a debtor-in-possession or a debtor post-confirmation to bring a preferential transfer cause of action rests entirely on express provisions of a reorganization plan that retains the causes of action and provides that jurisdiction of the bankruptcy court remains over such causes of action. 46 B.R. at 170; 42 B.R. at 222-223. Likewise, *Chernicky* stands with the proposition that a secured creditor may file a section 549 preferential transfer claim if no trustee is available to file the complaint, and if the debtor would somehow be irreparably harmed in connection with other business activities had it filed the claim. 67 B.R. at 832.

Claims for preferential transfers, of course, are created by the Code. Limitations and standing to bring such claims are defined and governed by the Code. Accordingly, a court's interpretation as to whether a debtor may bring such a claim, when the statute expressly provides that the trustee is to

bring a claim, is in no way analogous or related to application of section 108(a)'s tolling provisions to a post-confirmation debtor. The Besing's claims are common law claims brought in state court. None of the cases relied upon by the Besings even remotely suggest that the tolling provision would apply to them after the bankruptcy estate ceases to exist.

The Besings rely most heavily upon *In re Tennessee Wheel and Rubber Co.*, 64 B.R. 721 (Bkrtcy. Tenn. 1986). *Tennessee Wheel* also addressed the debtor's standing to pursue preferential transfer claims. In addressing the defendants' contention that these avoidance actions were not retained by the bankruptcy estate, the court held that:

> This ground is baseless because the reorganized debtor is the statutory successor in interest to the pre-confirmation debtor and the plan of reorganization clearly contemplated retention of jurisdiction by the bankruptcy court to complete the prosecution of these avoidance actions.

64 B.R. at 727. Accordingly, the rationale in *Tennessee Wheel* is consistent with Lynch's position. If a claim is expressly reserved by the reorganization plan, then a debtor post-confirmation may pursue such claim for the benefit of the estate. Unfortunately for the Besings, the Plan did not retain their causes of action against the Appellees.

The Besing's reliance upon *Seawinds Limited v. Nedlloyds Lines, B.V.*, 80 B.R. 181 (N.D. Cal. 1987) is also misplaced. *Seawinds* involved unfair competition claims and application of the Shipping Act of 1984. The court merely held that, based upon the facts of that case, the limitations period provided in the Shipping Act of 1984 applied, and that of section 108(a) did not. Any interpretation of section 108(a) by the court is *dictum* and not binding on any court. Interestingly, the court in *Seawinds* cited section 1107(a) when it stated that section

108(a) applied to debtors as well as trustees. Indeed, the cases relied upon by the court in *Seawinds* in making this *dictum* expressly hold that the tolling provision applies to debtors-in-possession under section 1107(a), not post-confirmation debtors. *See In re Santa Fe Development & Mortgage Corp.*, 16 B.R. 165, 167 n.1 (Bkrtcy. Bank App. Pan., 9th Cir. 1981); *In re T.C.I., Ltd.*, 21 B.R. 876, 878 (Bkrtcy. N.D. Ill. 1982).

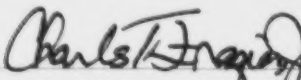
Lynch submits that the Fifth Circuit's holding in *Cunningham* is dispositive and that its progeny should be followed. These cases support Lynch's contention, as well as the holdings of the courts below, that where a debtor fails to retain or reserve a cause of action in its reorganization plan, this cause of action reverts to the debtor who no longer occupies the role of a fiduciary and who is not entitled to the benefits of section 108(a).

C. CONCLUSION

The decision of the Fifth Circuit correctly applies collateral estoppel to the state court judgment holding that Petitioners failed to timely file their legal malpractice suit. The Texas appellate courts are exercising appellate jurisdiction, and not review *de novo* of the state court judgment. Furthermore, the special allocation of jurisdiction rule is inapplicable because the state courts have jurisdiction to determine this incidental bankruptcy issue in a legal malpractice claim. Moreover, as debtors post-confirmation, Petitioners are not entitled to the tolling provision of section 108(a) because their legal malpractice claim was not retained by the bankruptcy estate. Petitioners have wholly failed to establish any error in the Fifth Circuit's disposition of the appeal from the district court. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

COWLES & THOMPSON

BY: 
Charles T. Frazier, Jr.
Texas State Bar No. 07403100

4000 NationsBank Plaza
901 Main Street
Dallas, Texas 75202
(214) 670-1100
(214) 698-0310 (Fax)

Attorneys for Respondent
Lynch, Chappell, Allday
and Alsup